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LAW REPORTS*

INTRODUCTION.

THE ordinary man's conception of the law reports is, in the main, one of lugubrious tomes found on the Lawyers' shelves and designed so far as he can make out, for the confounding of the unwary and the defeating of law, if not justice and many a client has been heard plaintively inquiring, when informed that he had no case, if none of the volumes in the Lawyers' Library could save him. If he knew a little bit of legal history, he would have had the satisfaction of knowing that these reports, especially the ancient ones, are records of persistent efforts like his, not only on the part of lawyers but also of Judges to get round the law. At one time, it was an attempt to get round the rules of pleading; at another it was an attempt to get round inconvenient rules of common law ; at other of inconvenient statutes. Paradoxically enough, it was largely by this process of successful evasion that the English Law has attained its present perfection. Though the Courts have ceased to play the part of reformers, for the lawyer it is still more or less the same old story and the reports are his great allies. But that is not the only point of view from which the value of the law reports should be judged.

The historian of law will be able to trace with their aid the various stages through which the law has passed before attaining its present condition. He will find in them the shedding of old ideas and the growth of the new ones. He will find therein the apotheosis of forms and technicalities and their discomfiture. He will be able to trace many a legal doctrine to its source which he could not otherwise have done. He will be able to discover curious parallelisms of thought ; for instance, who could have expected to find in the English system an idea like this—that all the rules of Common Law

*The first of a series of lectures arranged by the University of Madras delivered by Mr. Sitarama Rao, Vakil, High Court.

are worn out statutes, in other words, that they represent some statute which is not now traceable—an idea which has its parallel in the Hindu idea that all *shishtacharas* or usages represent the injunctions of some lost *Smriti* or *Sruti* or the other idea that the rules of Common Law are there from eternity and become manifest when and as occasion requires which is strangely like the Hindu idea of the eternity of the Vedas. I am referring to these merely to show what value these records possess for the historian.

The student of law will find in them elucidated the principles of law in all their ramifications and illustrated by concrete examples. In America, a method of study is pursued in some of the Law Schools known as the Case Study System wherein instruction is given to the students with the aid of cases much in the same way as it is done elsewhere with the aid of text-books. The success of that system clearly shows that a scientific study of law is possible with cases alone. We may illustrate it with an example from our reports. Suppose, we take the case of Hanuman Prasad Pandey as our text and after reading it, we take case after case in which the propositions laid down in that case have been applied, extended and distinguished. When we have done that, suppose we next proceed to consider analogous hypothetical situations and canvass the application of the propositions of law heretofore elucidated to those situations. When we have done all that, who can doubt we shall have made a fairly complete study of the subject of the powers of guardians, managers, life-owners and other persons similarly situate and that in a manner more impressive than could have been done with the assistance of any text-book. Mr. Mayne adopts this plan with great success in certain of his chapters on Hindu Law which deal mainly with judge-made law. It gives a practical training similar to that one gets in handling cases oneself. The efficacy of this method is less marked in cases where one has to start with a code or a statute.

To the student of history, they give a sort of day to day, year to year account of the doings of the Courts with a variety of situation and incident throwing abundant light on the customs and manners of the times. This is what a great lawyer says of these reports:—" They are worthy of being studied by even scholars of taste and general literature as being authentic memorials of the business and manners of the age in which they were composed. Law Reports are dramatic in their

plan and structure. They abound in pathetic incident and displays of deep feeling. They are faithful records of those little competitions, factions and debates of mankind that fill up the principal drama of human life and which are engendered by the love of power, the appetite for wealth, the allurements of pleasure, the delusions of self-interest, the melancholy perversion of talent and the machinations of fraud. They give us skilful debates at the bar and elaborate opinions of the Bench." Kent's *Commentaries*, Vol. I, p. 185. Some of the picturesque elements referred to are more present in ancient reports than in the modern. The reports are generally confined at present to their main object, namely, of recording the opinions of Judges on points of law with so much of facts and arguments as are necessary for the proper appreciation of the points that arise but what is lacking by the omission of the personal element is made up by the variety of the matter served up. It is recorded of an ancient lawyer that he rarely travelled without putting a volume of the year books in his carriage and reading it whenever he wanted to refresh himself on the fatigues of the journey. Coming to more recent times, Lord Bramwell, though he did not read much of them, he said, while at the bar, read them when he became a Judge and found them most interesting reading. I have known a distinguished lawyer of our own time who found the House of Lords' Reports most refreshing reading and took to them with the same zest with which young men take to novels. This is no doubt largely a question of temperament but it shows that there is much in them to interest one besides the purely legal element in them.

Under the legal system by which we are governed, no practical lawyer can do without more or less extensive acquaintance with the law reports. There are certain reports with which he must keep himself acquainted at his peril for they are binding authority. There are also other reports which though not binding one could ill-afford to ignore. Again, it is only through first-hand acquaintance with case-law that a practitioner will be able to acquire the proper perspective so to say—to realise the relative working value of the various legal points of view. It is not the settled point that the practical lawyer so much wants as the doubts and difficulties In this matter, we have not advanced very much from the ancient lawyer who took down notes which go under the name

of *Year-books*. A competent critic says of them, "The *Year-books* are eminently practical. They show how an action could be begun, delayed, carried out and defeated." That is the prime concern of the practical lawyer to-day as it was then. The successful lawyer's task consists largely in exploring possible avenues of attack and evasion and using the one or the other as occasion demands. In this, nothing can assist one so much as the careful study of the law reports, where he will find recorded similar efforts made in an infinite variety of circumstances with necessarily varying results. The activities of the legislature in some departments of law have rendered resort to old reports unnecessary but there are still so many departments of law untouched by those activities and even in departments where the legislature has been busy, the practical difficulties in the application of the written law are so numerous that a resort to the law reports remains as much of a necessity now as ever.

As already pointed out, not all reports have the same value. To us in Madras, the Privy Council Reports and the Madras Reports hold the first place, the Reports of the other High Courts come next. Irish, Scotch, Colonial and American Reports come last—some of them at the long last. On some topics of law, the Reports of the Native States are also of use. These various Reports cover so many volumes and range over such a large period of time and possess such varying degrees of authority that it was thought it would not be out of place to present a sort of chart indicating their extent, character, and relative value, the basis of their authority, their use and abuse, with all other information necessary or useful as a preparation for an adequate study of the reports. For a proper use of the reports, one must have some idea of the system of Courts in the countries from which the reports come, of the law which they administer, to what extent and in what respect that law differs from the law in his own country. It is only by a knowledge of the system of Courts that you will know the relative value of a ruling. For instance, it is only then that you will know that a *nisi prius* ruling is less authoritative than a decision of the Court *in banco*, that a decision of the Exchequer Chamber is more authoritative than that of the Exchequer, King's Bench or the Common Pleas Court. Failure to grasp the distinction that exists between the rulings of the Privy Council and of the High Court in which one practises and the rulings of the other Courts leads

many a novice in the art to go after reports of other Courts without taking pains to discover decisions of his own Court which, if available, would be fairly decisive. Another thing that is necessary for the proper use of a report is the knowledge of the procedure, at any rate, the main features of the procedure of the country from which the reports come. Not knowing the Scotch procedure, the Courts in India for a long time wholly misapplied the ruling in *Jenkins* v. *Robertson* (1). It was an action of *declarator* by some of the members of the public to vindicate a public right of way—a kind of action unknown to the English Law but known to Indian Procedure. In such an action, the House of Lords held that a decree obtained on a compromise between the parties to the record could not operate as *res judicata* in any subsequent action relating to the public right. In ignorance of the peculiar nature of the suit, the Courts in India thought that the decision was an authority for the general proposition that a compromise decree can never operate as *res judicata* in a subsequent suit. It took a long time before this was pointed out. To give another illustration, take the case of *National Telephone Company* v. *The Postmaster-General* (2) where you find laid down a proposition like this :—" When a question is stated to be referred to an established Court without more it imports that the ordinary incidents of the procedure of that Court are to attach and also that any general right of appeal from its decisions likewise attaches. " Before you apply a ruling like that to India, you must be sure that there is a general right of appeal. Under the English procedure, there is a right of appeal from every order. Under the Indian procedure, there is a right of appeal from every decree and from such other orders as are specified. You could not therefore generally predicate that an appeal lies, as the English Judges were prepared to do in the conditions applying to England. In India if the order in a particular case conforms to the definition of a decree or is one of the other specified descriptions, an appeal will lie but not otherwise. Similarly many decisions of English Courts have become obsolete by reason of the momentous changes in procedure introduced by the Common Law Procedure and Judicature Acts. Take the case of *Wood* v. *Leadbeater* (3) which was taken for a long time to lay down that a licensee

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1. (1845) 13 M & W 838. 2. (1913) A C 546. 3. (1915) 1 K B 2.

could not resist being evicted though he had a binding agreement in his favour that the license should not be revoked. Suit for eviction or for damages for unlawful eviction lay in one Court, the Common Law Court, and the suit for injunction or specific performance lay in another Court. There was no means of co-ordinating the two. With the Judicature Act all this is changed. The Common Law Courts exercise powers vested in the Equity Courts and where there is a conflict between the two, Equity prevails. As a result, when an action is brought for eviction, the Courts interpose their power of making an injunction on the agreement with the result that the substantive law itself is changed. Similarly it used to be stated to be an elementary rule of English Law that to an action on a promissory note an agreement not to sue could never be a bar. The effect of the merger of the two jurisdictions is that it is now recognised as an effective bar. The rulings of English Courts based on statutes would be of assistance in India only if the wording of the Indian Acts is similar to or identical with the wording of the English Acts. In some departments of law, old English decisions are of authority in India but not the later ones on account of the change in the law by Statutes. English decisions are not quite on the same footing as other foreign decisions. In the Presidency Towns, by special Acts of Parliament, English Law as it stood on a particular date was introduced into India and in those parts, that law continues to be applicable so long as it is not altered by the legislature. But as has been pointed out by the Privy Council in the case of *Mayor of Lyons* (1), it did not involve the introduction of statutes manifestly unsuitable to Indian conditions. The Mortmain Act and other statutes such as the one disqualifying aliens from holding land have accordingly been held not applicable to India. In the mofussal, English Law is applied as a rule of equity and good conscience. There, too, it is subject to the qualification that the rule of English Law in question should not be one unsuited to the Indian society and conditions. Their Lordships of the Privy Council had recently occasion to remark " in proposing to apply the juristic rules of a distant time and country to the conditions of a particular place at the present time, regard must be had to the physical, social and historical conditions to which that rule is established by authority (2)." Acting on this principle, the

1. (1836) 1 M I A 175. 2. (1913) I L R 42 C 489 at 531.

Indian Courts have declined to apply many technical rules of English pleading and of property law. Applying a similar line of reasoning, the American Courts have declared several rulings of the English Courts inapplicable to the conditions of American society. On some points, Indian Courts have been disposed to regard Indian conditions to be more approximately like the American than the English and accordingly have preferred to apply the American rule. The practice of citing foreign cases—meaning thereby American cases—has received a set back by certain observations of the Privy Council deprecating such practice. Without an elaborate study of the complicated system of Courts in the United States and the systems of law administered in each of the States, one cannot properly appraise the value of an American ruling. In some parts of that continent, the Common Law rules ; in others, there are special codes; in others again, the Spanish Law prevails. In some States, the ante-diluvian Common Law and Chancery Procedures with all their technicalities and re-duplication of Courts still obtain. In others, a reformed procedure governs and there is such a vast difference in the qualities of the Judges and the bar of one State and another (in some States the Judges are elected and the only necessary qualification for a member of the bar is the possession of a good moral character) that it is with the greatest difficulty that you can properly value a ruling. In the United States, the value of the ruling of a Court with reference to the same Court varies according to the locality and the subject-matter. The same federal Courts apply one law in one State or in cases arising from one State and another in another. Making allowance for all these factors which detract considerably from their value, there is still much in the American Reports which is likely to be of assistance in the administration of law in this country. On certain branches of law like the Mercantile Law or the Law of Shipping, the Indian Courts have habitually applied the English Law. The limitations subject to which English as well as foreign reports can be used in this country can usefully be made the subject of careful study and a clear knowledge of those limitations will keep us from many pit-falls into which we might otherwise fall. As these reports cover a long period of time and are of varying authority, a knowledge of the characteristics of the times to which each report relates, the capacity of the reporter, and the value attached to the reports locally must also greatly assist us in making a judicious use of

them. Nor can it be doubted that a clear exposition of the rule as to precedents and their binding authority on which as we shall presently show, the importance of the law reports so largely depends, is worthy of careful investigation as a preliminary to the study of the reports. It shall be our endeavour in the subsequent lectures to elaborate these various points.

Law Reports are at present found in almost all civilised countries of the world, even in those countries which do not recognise the binding authority of precedents. When Asahaya. the commentator of Narada, records the discomfiture of Smarta Dhurandhara in carrying his point as to the great-grand-son's non-liability for the debts of his great-grand-father or when Nilakanta refers to the dictum of his father Shankara Bhatta as to the eligibility of a married man for adoption, we have the rudiments of a law report. But somehow, the idea never took shape in Hindu jurisprudence. It is otherwise with Muhammadan jurisprudence. We have a much nearer approximation to a law report in the *Fatwa Alamgiri* which is a collection of *Fatwas* or decisions of Courts during the time of Aurangazeb. The fall of the Mughal Empire and the resultant confusion, however, made further progress impossible. The theories of Roman Law also were not congenial to the growth of law reports. It is only in England that you find the law reports as a flourishing institution from very early times and it may well be regarded as a peculiarly English institution. Printed reports date from 1292. Besides, you have manuscript notes of cases and Court records going back to Norman Conquest, that is, long before the period of legal memory as understood in England. Old lawyers made such a fetish of these reports that a matter-of-fact lawyer like Lord Coke permits himself the extravagance of calling Moses the first reporter. Law Reports possess an importance in England and in countries governed by analogous judicial systems which they do not possess elsewhere. It is due to the English rule as to the binding authority of precedents. The principle on which a case has been decided constitutes under that system a rule of law to be followed in all subsequent cases, until it is reversed or set aside by a higher authority and in the case of the House of Lords, there being no higher authority, the decisions are absolutely binding. This doctrine constitutes a real difference between the English and the Continental systems of jurisprudence. In France, for instance, there is

no such rule ; on the other hand, the rule is that no inferior Court should give the decision of a superior Court as the ground for its decision. The Courts are expected to govern themselves primarily by the Code and if it fails, they are expected to decide on the analogy of the Code. Under that system, text-writers possess greater authority than the reports. More or less similar is the rule in other countries on the Continent though there are indications to show that Germany is slowly approximating to the English standpoint. The importance of precedents has made lawyers take notes of cases from the earliest times and for a long time, the reporters were almost exclusively drawn from the class of Chief Justices, Judges and nowhere anything smaller than an Attorney-General. Some Judges did not like their cases to be reported, for instance, Lord Stowell who for some time, in the beginning of his judicial career, prohibited his cases being reported but soon yielded to the prevailing sentiment and his judgments also came to be reported—to the great advantage of his own reputation and the department of law which he administered. In Chancery, authority of precedents came to be recognised much later than in Common Law and as a result we find that regular reports also appear much later. As the doctrines of Equity have been of gradual growth, in some departments of equity, early precedents are of hardly any value.

In England, reports have been mostly the result of private enterprise. One experiment was tried by Lord Bacon to officialise the reports and that egregiously failed. Since, with one trifling exception, there has been no attempt at official reporting. Reporting in England at present is done mainly under the supervision of the Council of Law Reporting which consists of the representatives of the various governing bodies of the profession. Private reporting, however, still continues. Any report vouched by a Barrister to be correct can be freely cited before any English Court. Some of the early reports were anonymous publications. Some were published long after the death of the reporters, sometimes, without even any indication as to the place where the original manuscripts could be found. Some reports were mere short notes of cases—others were full notes. Till recently reports were hardly ever *verbatim*. Editing the judgments is not considered improper. Some contains arguments and facts, others merely judgments. The modern conception of a law report involves more or less contemporaneous publication. It was only in recent

times that reports acquired this quality. There were at certain times what were styled authorised reports but all that was conveyed by that expression was that the reports bore the certificate of some of the Judges whose judgments they reported. In India, the Law Reports Act creates monopoly of reporting in favour of the State, but in spite of this statutory monopoly, private reports are thriving and there seems to be no prospect of their dying out. Other countries have their own system of reporting. Exclusive devotion of certain classes of practitioners to special branches of law has led to publication of reports exclusively devoted to those branches of law like the Election Reports, Bankruptcy Reports, Reports of Commercial Cases, of Company Cases and so forth. The subject of the evolution of the law report is in itself a fascinating study and we shall devote a separate lecture to it.

By flux of time and under a free system of open competition reports have multiplied enormously and still they come. Even in the time of Lord Coke, the growth of the Law Reports was viewed with apprehension and Lord Coke is reported to have answered when asked as to why the law reports grow bigger, that it was because bigger rogues are found in the world. Lord Bacon suggested a revised edition of the law reports omitting all cases which merely reiterated a well-known proposition or had been overruled or had otherwise grown useless. His tenure of office was too short to carry out his project. Though the need for such a revision is much greater now than it could have been in his time, no lawyer has been able to put before the public a thoroughly useful revised edition. The revised reports undertaken by Sir Frederick Pollock on the lines laid down by Bacon have not fulfilled the expectations entertained of them by reason of the learning and experience of the editor. The multiplication of reports has been most marked in the United States. The effect of the multiplication has been, it is said, to contract largely the field of citation. Each State confines itself now to its own reports. It is only in America that the publication of select cases has been a business proposition and also popular. American State Reports and the Lawyers' Reports annotated are instances in point.

There have been early instances of annotated reports in England, like Saunders Reports, with notes of Sergeant Williams, but there are more of them in America than in England. Some attempt has been made in India to publish an-

notated editions of reports though not on such a large scale as in America. Leading cases are yet another variety of reports —rather text-books with reports as their basis. Smith's Leading Cases and White and Tudor's Leading Cases in Equity are the best instances in point.

There is yet another kind of publication to which reference should be made, *i. e.*, the digest. To a modern mind, nothing looks so obvious as a Digest, but it has taken long o evolve a digest. It has risen from the lawyer's note or common-place book, through the intermediate stage of abridgments. There was a long contest between the alphabetical and the analytical order—the ultimate victory resting with the alphabetical. Some lawyers, scientifically inclined, could never reconcile themselves to the ordinary digest which put murder and marriage together for no better reason than because *u* came after *a*. But most people find the alphabetical order convenient. It is idle to expect these digests, however well prepared, to take the place of Law Reports or even afford a tolerable substitute for the reading of Law Reports any more than a dictionary or grammar can take the place of Literature. Unless the student assimilates the Law Reports, he can never make a considerable lawyer and this is a thing which can never be too much impressed upon the rising generation of students and lawyers and affords a justification for our embarking upon an enterprise like the present.

SUMMARY OF ENGLISH CASES.

VERGE *v.* SOMERVILLE, (1924) A. C. 496.

Will—Charitable trust—Test of—Bequest for " New South Wales returned soldiers"—Validity.

To ascertain whether a gift constitutes a valid charitable trust so as to escape being void on the ground of perpetuity the first enquiry must be whether it is public—whether it is for the benefit of the community or of an appreciably important class of the community. It is not necessary that the class should be confined to poor persons to the exclusion of persons not poor.

A gift " unto the trustees for the time being of the ' Repatriation Fund ' or other similar fund for the benefit of New South Wales returned soldiers " is a valid charitable trust,

STAPLEY *v.* READ BROTHERS, LTD. (1924) 2 Ch. 1.

Company—Goodwill written off out of profits — Restoring goodwill as asset—Right to divide profits subsequently earned.

In keeping accounts, a company applied its profits in writing off a corresponding amount of the value of goodwill instead of carrying these profits to a goodwill depreciation fund, in which case they would have been at liberty at any time to distribute the profits. *Held,* the shareholders cannot thereby have intended for all time and in all circumstances to give up their claims to these profits and to treat them as capital only. They can, if they think fit, write back to the profit account so much of the depreciation written off goodwill as has proved to have been in excess of proper requirements.

In re CULLUM MERCER *v.* FLOOD, (1924) 1 Ch. 540.

Will—Construction—Trust in favour of sons of "brother"—Ultimate trust in favour of "own right heirs"—Brother found illegitimate—Daughters of brother—If right heirs.

Under a will, the testatrix demised her estate to the second son of her "brother" X for life, and then to his son in tail male and in default of issue to her own "right heirs". All the prior limitations having failed, the daughters of X claimed as her "right heirs". It was proved that the testatrix and her brother were illegitimate, but there was nothing to show she was aware of it, nor that they were children of the same mother. *Held,* the claimants had not proved they were the rightful heirs of the testatrix.

The words "children" and "brother" and other words indicating relationship when used in a will, refer *prima facie* to a relationship traced through a legitimate tie. But a testator can with sufficient clearness show in his will that he meant to include by the use of such words even persons claiming through other than a legitimate tie. (1902) 2 Ch. 542 distinguished.

BRITISH THOMSON-HOUSTON CO., LTD. *v.* STERLING ACCESSORIES, LTD., (1924) 2 Ch. 33.

Company—Directors—Liability of—Infringement of—Patent.

Where it is sought to fix a defendant with liability for a tort it must be established either that he is himself the tort-

feasor or that he is the employer or principal of the tortfeasor, in relation to the act complained of, or at any rate the person on whose instructions the tort has been committed.

Where a company has infringed patent rights, the directors cannot be made liable simply because of their position as such.

In re GOODWIN : AINSLIE *v.* GOODWIN, (1924) 2 Ch. 26.

Will—Gift subject to a condition—Time if of the essence—Annuity to wife subject to condition—Death of wife without performance—Executors if can perform—Personal nature.

Where a gift in a will is made subject to a condition to be performed within a specified time, but it is not so performed, then at any rate in the absence of an express gift over, the Court has to determine if time was of the essence of the matter. In deciding the question, the Court will have to look to what was presumably the intention of the testator in inserting the condition, what it was he desired to bring about or guard against; and if the Court finds that a performance of the condition at a time subsequent to the time fixed in substance provides for the very thing the testator intended, so that all parties can be put in substantially the same position as they would have been in had the condition been performed in time, time is not regarded as of the essence and such performance is treated as a sufficient compliance with the condition.

A husband who had covenanted to pay a certain annuity for his wife, by means of his will bequeathed to her a higher annuity, but the latter was to become void if within six months of his death she did not release her claims to the prior annuity. There was no gift over on default. As the solvency of the estate was doubtful she did nothing to indicate her desire either way for more than three years after his death. On her death, her executors proposed to release the first annuity and claim arrears on the basis of the bigger sum. *Held,* the condition was not personal to her and there would be a sufficient compliance with the condition.

SHERWOOD *v.* TUCKER, (1924) 2 Ch. 42.

Lease—Construction—Option to buy during currency of lease—Extension of lease—If option extended.

A lease for a period of three years contained an option given to the lessee to purchase the freehold at a named sum during the currency of the lease. Just before the expiry of the term, the parties informally agreed to extend the period of the lease. *Held,* the extension applied to all the provisions of the lease, collateral or otherwise, and hence the period for exercising the option to purchase the freehold was also extended.

In re HAWKINS : WATTS *v.* NASH, (1924) 2 Ch. 47.

Donatio mortis causa—*Possession by decree—Placing it for safe custody with donor—Effect.*

For a valid *donatio mortis causa* the possession of the donee must continue till the death of the donor. Where after receiving possession, the donee places them with the donor in order to ensure its safe custody, the donee does not part with possession and the gift remains perfectly valid.

In re CLOUT AND FREWER'S CONTRACT, (1924) 2 Ch. 230.

Trustee—Disclaimer—Presumption—No action taken regarding legacy for 30 *years—Effect.*

Where a trustee appointed under a will lived for 30 years after the death of the testator, but during that period did nothing even as regards a legacy left to him, his conduct amounts in law to a disclaimer. 6 Ch. D. 531; 40 Ch. D. 436 applied.

In re GARDNER : ELLIS *v.* ELLIS, (1924) 2 Ch. 243.

Will — Construction — Income to grand-children equally—Children of deceased grand-child to get parent's share—Joint tenancy or tenancy-in-common.

A testator directed the income of his property to be divided equally among his grand-children and on the death of any of them, his or her share was to go to their children. One grand-child died leaving three children ; one of these last died and the question arose as to who took his share. *Held,* on a construction of the will, the children of the grand-child held the share as joint tenants and not as tenants-in-common.

BATCHELOR *v.* MURPHY, (1924) 2 Ch. 252.

Lease—Option to lessee to purchase freehold--Surrender of lease and grant of new lease to another for unexpired period—Lease on same terms and conditions—If option to purchase passes.

A lessee who had an option to purchase the freehold wanted to free himself from all liability before the expiry of his period and a memorandum was drawn up between the lessor, lessee and a stranger according to which the lessee was relieved of all liability and the lessor agreed to execute a new lease to the stranger for the unexpired portion of the period on the same terms and conditions as the old lease, except as regards rent. The stranger took possession but no fresh lease was executed. He claimed to exercise the option to purchase. *Held,* the option to purchase was not a term of the tenancy, but a collateral bargain which did not pass to the stranger.

In re PITCHFORD, (1924) 2 Ch. 260.

Bankruptcy—Debts which can be proved—Contingent debt or liability—Costs in action stayed by creditor—Bankruptcy Act, 1914, *S.* 30 (3).

Pending an action on a debt, the debtor became bankrupt whereupon the creditor obtained a stay of his action and lodged his proof before the Official Receiver. In addition to his debt, he claimed to prove his untaxed costs in the action. *Held,* he was not entitled to prove untaxed costs as he had not obtained judgment but himself elected to stay his action.

Per Astbury, J.—The untaxed costs is not a debt certain or contingent within the meaning of S. 30 (3) of the Bankruptcy Act, 1914 [which corresponds to S. 34 (2) of the Provincial Insolvency Act (V of 1920)].

In re HAMMOND PARRY *v.* HAMMOND, (1924) 2 Ch. 276.

Will—Construction—Gift to son for life and afterwards to his children—Rule in Shelley's case—Gift of personalty equally to two named daughters and their issue—Nature of estate taken.

A testator devised his freehold estate to his son for life and afterwards to his children if any and his residuary personal estate "equally between" his two named daughters and "their respective issue". *Held,* as regards the former, the rule in *Shelley's*

case applied and the son took an estate tail; as regards the latter, the term "issue" is not a word of limitation, but the issue take as purchasers and having regard to the words "equally between" and "their respective issue" the intention was to make a stirpital division in moieties to each daughter and her issue. The question whether as between a daughter and her issue they take as joint tenants or tenants-in-common was left open.

JAY *v.* JAY, (1924) 1 K. B. 826.

Will—Tenant for life—Duty cast to repair—Failure to do—Remedy—Nature of—Limitation.

Under the terms of a will, a person became a tenant for life of the suit premises, the will also providing that he should keep the property in good tenantable repair. He defaulted in making repairs and the remainderman brought an action against the executors of the tenant for life to which the latter pleaded limitation. *Held,* a person who obtains a benefit under a will must also shoulder the burden, and the cause of action accruing to the remainderman can be regarded as arising (1) out of a tort, or (2) out of an implied contract, or (3) by reason of a Court of Equity compelling the person who has taken the benefit to fulfil the conditions upon which he took it. The true view to take is the last-mentioned one and the moment a Court of Equity recognizes the equitable liability, it will enforce it regardless of any statute of limitation.

PHIPPS AND CO., LTD. *v.* ROGERS, (1924) 2 K. B. 45.

Landlord and tenant—Notice to quit—What to contain—Months—Lunar or calendar—Legal and business documents—Distinction between.

A notice to quit, though it need not actually name the date for quitting, must indicate with reasonable clearness when possession will be demanded or given, so that the other party may know what is required of him, and the time must be the proper time as provided by the lease. If it is so worded as to mislead the other parfy or leave him in complete doubt as to when possession must be given, or if it is for a wrong date, it is a bad notice. If the notice is subject to uncertainties, it is bad in la w.

The term "months" in legal documents, which are not business or commercial documents, refers to lunar months. But the context may show the parties meant calendar months. Slight evidence is sufficient to show that calendar months were meant. The lease of a public house is a business document and the word "months" used therein means calendar months.

INLAND REVENUE COMMISSIONERS *v.* GEORGE BURRELL, (1924) 2 K. B. 52.

Supertax—Company—Winding up—Undivided profits of prior years—Distribution of—If profits.

Where a company is wound up voluntarily and undistributed profits which have accumulated during past years is handed over to the shareholders, they cease to be profits because of the winding up and are assets. Hence they are not liable to supertax.

GAYLER AND POPE, LTD. *v.* B. DAVIES AND SON, LTD., (1924) 2 K. B. 75.

Negligence—Trespass of animals—Liability of owner.

The general rule of law is that a man is liable for the trespass of his cattle. But this rule does not apply to damage caused by a horse straying off a highway in which it lawfully was and the owner is liable only on proof of negligence.

Where a pony and van, wholly unattended, dash into the plaintiff's shop window adjoining a highway, there is a *prima facie* negligence and unless the owner satisfactorily explains the situation, he is liable for damages.

Case-law and principles fully discussed.

GEORGE WILLS AND SONS, LTD. *v.* CUNNINGHAM, SON & CO., LTD. (1924) 2 K. B. 220.

Contract—Sale of goods—Clause of exemption—"Unforeseen contingencies excepted"—French occupation of Ruhr—If a valid plea.

In an action for damages for breach of contract for sale of goods the defendants relied on a clause which recited that unforeseen contingencies were excepted. They pleaded that the

French occupation of the Ruhr had so disorganised industrial Germany that they were relieved from performing their contract. *Held*, it was not enough for defendants to show they could not obtain the goods from the particular source they contemplated, if they could have obtained them elsewhere, though no doubt at an enhanced rate.

LANCASTER *v.* TURNER AND CO., LTD. (1924) 2 K. B. 222.

Sale of goods—Clause permitting invoicing back to seller—Fall of market—Seller if can take benefit of his own default.

A contract of sale contained the following clause :—"If the seller defaults in shipping or declaring shipment the contract shall be closed by invoicing back the goods contracted for at such price, whether higher or lower than the contract price, as X shall determine, such price to be accepted as final and binding. X shall if requested by either party declare the closing price and settlement shall be made in accordance therewith." The sellers defaulted as their own suppliers made default and then applied to X to declare the closing price, giving notice of it to the buyers. The market price had been falling since the date of the contract and the sellers claimed the difference between the contract price and the closing price as declared by X. *Held*, by the majority of the Court of Appeal (Scrutton, L. J. dissenting) though the sellers were in default, the clause would apply and their claim was sustainable, the closing price being fixed with reference to the date on which the buyers received notice of inability to perform by the sellers.

Per Bankes, L. J.—It is no concern of the Court to consider whether the rule is reasonable or not. *Quaere* What is the position if the seller's default is voluntary or the transaction merely a gaming or wagering contract or if at the date of the declaration of default the contract goods were not procurable ?

Per Scrutton, L. J.—The words "settlement shall be made" seem to point to settlement of the default and the claim for damages then being made by the seller, and not clearly or at all to indicate a payment by the buyer who is not in default. Any other construction will make the transaction simply a bet.

SWEDISH CENTRAL RY. CO. *v.* THOMPSON, (1924) 2 K. B. 255.

Income-tax—Company—Residence—Incorporation and registered office in England—Business abroad and profits received abroad—Liability to tax—Income-tax Act, 1918, *Sch. D, Case V.*

The appellant Railway Company was originally incorporated under the Companies Acts, the registered office being in London. The railway line was leased out and the annual rent was payable in London. Subsequently the control and management were removed from London to Sweden, but a Committee in London dealt with transfer of shares in the United Kingdom, attached the seal to share and stock certificates and signed cheques on the London Banking Account. No part of the profits was transmitted to the United Kingdom except the dividends payable to the shareholders there. The question arose whether the annual rent was taxable in England. *Held,* by the majority of the Court of Appeal (Atkin, L. J. dissenting) the Company was resident within the United Kingdom and as such assessable to income-tax on the rental wherever received. Case-law reviewed.

Per Pollock, M. R.—The existence of more than one residence for a Company has been recognised by law, one of which may expose it to liability to income-tax.

Per Warrington, L. J.—The fact that the real control and management of an English Company is exercised abroad does not justify the Court in holding it is not resident in England. The registered office is a residence of the Company, at whatever other place in the United Kingdom or abroad, it may also reside. Keeping and entering up the register of shareholders is a vital function of the Company and can only be performed at a place where it is resident.

Per Atkin, L. J.—For income-tax purposes a Company can have only one residence and that is where the real business is carried on.

WILLIAMS *v.* BALTIC INSURANCE ASSOCIATION, LTD., (1924) 2 K. B. 282.

Insurance—Motor-car—Third party risks—Right of indemnity.

An insurance company insured a motor-car, and the company agreed to indemnify the owner "against all sums for which the insured (or any licensed personal friend or relative of the insured while driving the car with the insured's general knowledge and consent) shall become legally liable in compensation for loss of life or accidental bodily injury caused to any person." While the car was being driven by the sister of the insured, who was a licensed driver, with the general knowledge and consent of the insured, an accident caused personal injuries to third parties, who successfully sued her and obtained damages. The insured sued the Company for indemnifying his sister. *Held*, the Company was liable.

COUNTESS WARWICK STEAMSHIP CO. *v.* OGG, (1924) 2 K. B. 292.

Income-tax—Deduction—Contract for purchase of ship—Amount paid to cancel contract—If a business expenditure.

A steamship company placed an order with a firm of shipbuilders for purchasing a ship. Some time later finding a slump in the shipping trade they cancelled the contract by paying a certain sum of money to the builders as compensation and then claimed a deduction of this sum for purposes of income-tax: *Held*, the payment couid not be treated as a loss in computing the profits and gains for purposes of income-tax.

THOMAS *v.* THOMAS, (1924) P. 194.

Divorce—Desertion—What amounts to—Turning out the wife after acts of cruelty—Subsequent repentence—Effect of.

A husband after many acts of cruelty towards his wife actually turned her out of the house. He repented of his last act the next day and offered to amend his conduct. On a question arising whether the acts amounted to desertion and whether the subsequent repentence did not terminate the desertion, *Held*, though desertion may be put an end to by subsequent co-habitation, a husband cannot obliterate his previous conduct by subsequent offers, as to the genuineness of which the wife may, upon reasonable grounds, entertain doubts.

Per Pollock, M. R.—Desertion is not a single act complete in itself and revocable by a single act of repentence.

Per Warrington, L. J.—Quaere Where there is nothing but a turning away of the wife, followed by a genuine expression of a desire on the husband's part for her return, whether the desertion would still continue

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JOTTINGS AND CUTTINGS.

Judicial Humour.—Chief Justice Erle, when a member of the Bar apologised for a sally of wit which set the Court in a roar of laughter, replied : ' The Court is very much obliged to any learned gentleman who beguiles the tedium of a legal argument with a little honest hilarity.' There are, it would seem, grave persons who, without objecting to a 'little honest hilarity' at the Bar or in the witness box, regard it as unbecoming on the Bench. It is solemnly announced that two members of the House of Commons—who, be it noted, sit for constituencies this side of the Tweed—intend to invite the attention of Parliament to what they regard as the growing tendency of judges to indulge in jests. Not the least amusing thing about this serious protest against judicial joking is that it comes after Mr. Justice Darling has retired from the ordinary work of the Courts. The habit of judicial joking may, no doubt, sometimes go too far. An incident in the career of Mr. Justice Stephen—who was by no means a 'judicial humorist' in the Gilbertian sense—indicates its danger. He was trying an action of slander in which both the parties were Billingsgate salesmen, and the counsel for the defendant was quick to turn the inherent humour of the situation to the advantage of his client. Mr. Dickens, now the Common Serjeant, but then a persuasive junior, recognising that the judge, like the jury and the rest of the Court, was enjoying the jocular aspect of the case, made a strong and successful effort to bring out the serious injury the plaintiff had sustained through the defamatory words spoken of him. Mr. Justice Stephen his sense of justice at once aroused, summed up in favour of the plaintiff, and the jury, also sobered by Mr. Dickens' appeal, returned a verdict for his client. At the close of the case the learned Judge sent this note to Mr. Dickens : 'Dear Dickens,—I am very grateful to you for preventing me from doing a great act of injustice.' Not, of course, that judges capable of relieving the tedium of Courts with a 'little honest hilarity' are less inclined to do justice than their more solemn brethren. They keep their humour 'within the limits of becom-

ing mirth'. Jests, judicial or forensic, are rare in the criminal courts. Whatever laughter is heard is usually created by witnesses. The Courts, whether civil or criminal, would, after all, have been much the poorer without a Maule, a Lockwood, or a Plowden. In the administration of the law, as in other spheres of life, humour is usually humane.

—*The Law Journal, September* 6, 1924, *page* 562.

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The Late Mr. Justice Bailhache.—It is with a feeling of deep grief, arising from a sense of personal loss, that we have to record the sudden taking-off of Mr. Justice Bailhache—one of the outstanding personalities of the British Bench. When, after a brilliant career at his University, followed by twenty years of steady plodding work at the Junior Bar, he won in a short period such success and distinction as a leader in the Commercial Court that he was promoted to a judgeship by the present Lord Chancellor, we welcomed the selection for the 'learning, vigour and courtesy' which he brought to the office. That was in 1912, and in the twelve years which have passed the Judge proved his possession not only of those qualities, but of those 'weightier matters of the law, judgment, mercy, and faith' which distinguish the greatest. He has passed away from us in the plenitude of his powers, and not only the legal profession but the whole community is the poorer for his loss.

—*The Law Journal, September* 13, 1924, *page* 573.

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Solicitors and the Bench.—Now that, to the deep regret of both branches of the profession, Mr. Justice Bailhache has passed away, Mr. Justice Horridge is the only occupant of the Bench who began his professional career as a solicitor. It is only a few years since the Bench numbered four judges who belonged originally to the 'lower' branch of the profession. There were Lord Swinfen and Sir Samuel Evans as well as Mr. Justice Bailhache and Mr. Justice Horridge. Other judges within the recollection of the present generation of lawyers who practised as solicitors before they joined the Bar were Lord Field, Lord Russell of Killowen, Lord Justice Lush, Mr. Justice Manisty, and Mr. Justice Low. Twice has the Woolsack been occupied by men who started their professional lives as attorneys. Lord Macclesfield and

Lord Truro were occupied in the drawing of briefs before they began to hold them. It pleased Lord Truro, when he received an address from the members of his old branch of the profession congratulating him upon his appointment as Lord Chancellor, to observe that, as exemplified by his own career, the humblest attorney upon the Roll was not excluded from the highest honours of the State. The truth of that saying has been signally demonstrated in our own time by a solicitor holding the office of Prime Minister in the greatest crisis of the country's fortunes. Of the solicitors who have eventually won their way to the Bench none has ever been held in greater regard than has the profound lawyer whose sudden death we regretfully chronicle this week.

—*The Law Journal, September* 13, 1924, *page*. 573.

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Separation Orders and the "Russell" Rule.—A way out of the inconveniences and hardships created by the rule laid down by the House of Lords, in the *Russell's case* seems to be indicated by the decision of Mr. Justice Horridge in *Andrews* v. *Andrews and Chalmers* (1). The facts in that case were very simple. In January, 1921, on the wife's application to a magistrate, an order was made granting her a separation, with suitable maintenance. This order was discharged in November, 1922, on proof to the satisfaction of the magistrates that she had been guilty of adultery with the co-respondent, and in the following month she gave birth to a child, which was duly registered by her in the name of the co-respondent. The husband then petitioned, in the present suit, for a divorce, and Horridge, J., who has been strict in his observance of the Russell rule, *held*, that it was displaced in these circumstances by the old rule of the Ecclesiastical Courts that a husband is assumed to have no access to his wife during the existence of a divorce *a mensa et thoro*, which applied to a separation order containing the usual non-co-habitation clause. Therefore he said, as the birth of the child in this case was more than nine months after the making of the separation order, bastardy could be presumed, and the rule in *Russell* v. *Russell* did not apply. He accordingly granted the husband petitioner a decree *nisi*, on proof of these facts. This decision really affirms the old principle laid down over two hundred years ago

1. W. N. 262

in *Inter St. George and St. Margaret* (2) that the presumption of legitimacy is reversed, and the child is presumed to be illegitimate, as long as there exists a divorce *a mensa et thoro*, which applies equally, of course, to its modern equivalent, a judicial separation. The husband may accordingly give evidence tending to bastardise the child when he seeks to prove adultery for the purpose of setting aside a separation and maintenance order, and *per contra* the wife, in bastardy proceedings, is not called upon to prove non-access on the part of her husband, but is treated in this respect as a single woman. The reasoning in the famous Lords' judgment seems to have left this well-established rule out of consideration; and perhaps its present assertion may be largely utilised to avoid the ill-effects of the judgment.

—*The Law Journal, September* 20, 1924, *page* 583.

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Wives as Witnesses.—Every body who values the fair fame of English justice will have welcomed the forcible protest made by the Recorder of London against the practice of a Government Department in securing a statement from the wife of a prisoner implicating him in a crime. In the case which induced Sir Ernest Wild to make his protest the Post Office, which was prosecuting a postman for stealing two letters, had obtained from his wife a statement which, when he was confronted with it, caused him to plead 'Guilty'. The fact that the prisoner deserved to be punished does not at all justify the method by which his punishment was secured, while the fact that the wife had been apprehended on a charge of shop-lifting when the police interrogated her as to her husband's actions aggravates rather than extenuates a practice so alien to the traditions of English justice. 'The practice,' said the Recorder, 'is contrary to the whole principle of the laws of England, and the Post Office must be taught that they have no rights that are not common to other prosecutors.' Even when the Criminal Evidence Act, 1898, was passed the intimacy of the marriage tie was adequately recognised. The Act, while making the wife or husband of an accused person competent to give evidence, provides that neither can be compelled to give it. The principle thus expressed in the Criminal Evidence Act is grossly violated when the officials of a State

2. (1706) 1 Salk. 208.

Department extort from a wife statements that incriminate her husband, especially when they do so in circumstances that make her peculiarly subject to their influence. One gathers from Sir Ernest Wild's strong comments that the Post Office exercises, even if it does not claim, a right not belonging to private prosecutors. It would be a sorry thing for English justice if the Continental system of 'interrogations' and 'confrontations' were to be tolerated; it would be a still more dangerous thing if the Executive—whose increasing appearances in the Courts have on other grounds been the cause of much misgiving—were permitted to introduce them.

—*The Law Journal, September* 20, 1924, *page* 584.

CONTEMPORARY LEGAL LITERATURE.

The Restraint upon Anticipation, says a writer in *The Law Quarterly Review* for April, 1924, was invented by Lord Chancellor Thurlow, though not in his judicial capacity. The origin is traced to Thurlow by Lord Eldon, in four reported cases (1). Lord Thurlow had to hold in two cases, *Hulme* v. *Tennant* (2) and *Pybus* v. *Smith* (3) that a married woman, for whom property had been settled in trust, could deal with it to pay off her husband's trusts, though the property had been settled for the very purpose of securing that the husband should not have any interest in or control over it. In the latter case one Thomas Vernon ran away with an heiress, a ward of the Court of Chancery, and married her in Scotland. When the couple were brought before the Lord Chancellor, Thurlow, he imposed the usual terms upon the husband, namely, that he should make a settlement of the lady's property so as to secure it for her benefit and prevent him from getting the control of it. A settlement was accordingly made by which both her real and personal estate were conveyed to trustees ; as to the real estate, in trust to permit her to receive the rents and profits for life, or to pay them to such persons in such proportion and for such uses as she should from time to time appoint, etc. ; and as to the personal property, in the same manner, except that in her

1. (1804) 9 Ves. 493, 494 ; (1805) 11 Ves. 221 (1811) 18 Ves. 434 ; (1817) 2 Mer. 487.
2. (1778) 1 Bro. C. C. 16.
3. (1791) 3 Bro. C. C. 339.

power of appointment the words 'from time to time' were omitted. Thomas Vernon at that time was heavily indebted to his Bankers, Messrs. Pybus. And within a few weeks of the elaborate settlement he persuaded his wife to assign her whole property to Messrs. Pybus, by exercising her power of appointment. The matter again came before Lord Thurlow, and though he had "a most anxious desire to find any principle of a Court of Equity strong enough to protect the property against the improvident act in question," the authorities were too much for him and he was constrained to hold in favour of the bankers. Thus, as Lord Eldon said in *Jones* v. *Harris* (4) although the Court had settled the property in order to protect it "with all the anxious terms then known to conveyancers, in a day or two afterwards, while the wax was yet warm upon the deed, the creditors of the husband got a claim upon it by an informal instrument and the same Judge who had made such efforts to protect her was upon authority obliged to withdraw that protection." This defeat of his efforts to protect the lady let Lord Thurlow to cast about for some means to reinforce the system of settlement to the separate use of a married woman. In a later case (referred to by Lord Eldon as Miss Watson's settlement) in which Lord Thurlow was himself a trustee, he added the words the income "not to be paid by anticipation." As Lord Eldon says : " I believe these were Lord Thurlow's own words, with whom I had much conversation upon it. He did not attempt to take away any power the law gave her as incident to property, which being a creature of equity she could not have at law, but as under the words of settlement it would have been hers absolutely so that she could alien, Lord Thurlow endeavoured to prevent that by imposing upon the trustees the necessity of paying to her from time to time and not by anticipation ; reasoning thus, that equity making her the owner of it and enabling her as a married woman to alien might limit her power over it." The writer gives further quotations from Lord Eldon's judgments to show that for many years after his Lordship entered into the profession no such thing was known as a clause of restraint upon alienation of a wife's separate property by way of anticipation, but that Lord Thurlow invented it ; and that Lord Alvanley thought it a valid clause ; and that so it had been considered ever since.

4. (1804) 9 Ves. 493.

BOOK REVIEWS.

THE LAW OF MUNICIPAL CORPORATIONS IN BRITISH INDIA, by P. Doraiswami Aiyangar, Second Edition, 1924. Rs. 20.

Mr. Doraiswami Aiyangar's *Law of Municipal Corporations in British India* has been the leading treatise on the subject ever since the publication of its first edition in 1914. The author was in a position to expound the law on the subject with authority by reason of his having been the legal adviser to the Madras Corporation for several years and was thereby in intimate touch with the various problems arising under the law of Municipal Corporations. Ever since the publication of the first edition, several enactments have been passed by the various legislatures which have materially altered the law on the subject; and the Government of India Act of 1919 and the consequent changes in the powers of the local bodies have a material bearing on the various questions referred to. This edition, therefore, appearing after these enactments, has a special value to those having anything to do with the law of Municipal Corporations and their progress as large portions of the book have been recast and rewritten. Though the author made ready the matter for this edition, a pathetic interest attaches to this work as he did not live to see the publication of it. We have examined the book carefully and can confidently say that, in point of thoroughness and accuracy, it fully maintains the high level of usefulness of the preceding edition.

THE NEGOTIABLE INSTRUMENTS ACT, by A. K. Nanniah, B.A., B.L. Lawyers' Companion Series, Third Edition, 1924. Published by the Law Printing House, Madras.

We have great pleasure in acknowledging the receipt of a copy of the Negotiable Instruments Act published in the well-known Lawyers' Companion Series with the case-law bearing on the several portions of each section noted under proper headings and brought down to the end of June, 1924. Being an enactment which is of daily use to the public, businessmen and bankers, a publication which brings the case-law on it up to date, would be of great assistance. The amendments to the Act to the end of 1923 have been incorporated in the book. The appendices to the book give the English Bills of Exchange Act and the provisions of the Indian Stamp Act and Limitation

Act having a bearing on the Law of Negotiable Instruments. The rules relating to the Notaries Public are given in Appendix C. The get up and printing of the work by the Law Printing House leave nothing to be desired. From what we have said we believe we are justified in hoping that this edition of the Negotiable Instruments Act will be a complete success.

We have great pleasure in acknowledging the receipt of the bare texts of the following Imperial Acts with the amendments brought up to date :—

The Criminal Procedure Code, Act V of 1898, as amended up to date inclusive of the amendments made by Act XXXVII of 1923.

The Contract Act, the Negotiable Instruments Act and the Specific Relief Act.

The Indian Evidence Act.

The Specific Relief Act.

The Negotiable Instruments Act.

The Transfer of Property Act, together with the Transfer of Property (Validating) Act of 1917.

The Easements Act and the Contract Act.

We think these publications of these bare enactments will be found of great use by the students in getting them up for their examinations.

THE LATE DR. S. SUBRAMANIA AIYAR,
Judge of the Madras High Court (1895—1907.)